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August 6, 2012

Via E-Mail & U.S. Mail

Thanne Cox, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: California Department of Parks and Recreation's July 18, 2012 Letter Requesting De-Listing as PRP

Dear Thanne:

This letter provides comments in response to the letter to you dated July 18, 2012 from Kathryn J. Tobias on behalf of the California Department of Parks and Recreation ("CSP") (the "CSP Letter"). In its letter CSP attempts to refute the U.S. Environmental Protection Agency's ("EPA") designation of CSP as a potentially responsible party ("PRP") at the Yosemite Slough Superfund Site ("Yosemite Slough" or the "Site") under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). Though the CSP letter evinces some confusion as to the basis for its having been named as a PRP at the Site, EPA was quite clear. EPA identified CSP as a PRP because contamination from its property has been released to the Site. EPA's General Notice of Potential Liability to CSP dated August 11, 2008 (the "CSP GNL") stated as follows:

> EPA believes that property owned by the California Department of Parks and Recreation has ***contributed to the hazardous substances which have come to be located at the Site***. EPA considers the California Department of Parks and Recreation to be a PRP at the Site as the ***current owner of property from which there was a release of hazardous substances***.

CSP GNL at 2 (emphasis added). EPA's stated rationale for naming CSP as a PRP at the Site remains valid, and CSP's request should be denied.

CSP makes three basic arguments in its letter. First, it argues that its property, the Candlestick Point State Recreation Area (the "CPSRA"), is not a source of contamination at the Site. However, CSP offers *no* evidence in support of this contention, and extensive data indicates that its property *is* a major source of the contamination in the Slough. Second, CSP contends that if the CPSRA is a source of contamination, it is not liable because hazardous substances released from the property had not been disposed there. This contention simply misstates the law. Lastly, CSP contends that it is not liable under CERCLA's Innocent Landowner Defense or the Contiguous Landowner Exemption because the hazardous substances at the CPSRA came from the Bay Area Drum site (and possibly also the City of San Francisco's combined sewer and storm water systems, and contaminated fill). CSP correctly notes that it must establish each element of these CERCLA defenses by a preponderance of the evidence, yet fails to provide even a shred of evidence in support of its assertions. In the interest of brevity, we don't address all of the elements of the defenses that CSP failed to establish, just the most significant ones. As shown below, CSP's arguments are entirely without merit.

A. CSP is a "Current Owner of Property From Which There Was a Release of Hazardous Substances" that Now Contaminate the Yosemite Slough Site.

CSP acknowledges that "CSP currently owns the [CPSRA] adjacent to the Yosemite [Slough] Superfund Site" and that "EPA may consider the CPSRA as a facility under CERCLA because the term 'facility' includes 'any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." CSP Letter at 1-2 (*citing* 42 U.S.C. § 9601(9)(B)). Despite this, CSP contends that the CPSRA is not a source of contamination in the Slough. It makes four baseless assertions in support of this contention.

1. CSP's Own Technical Analyses Contradict its Assertion that there was No Release from the CPSRA.

CSP contends that "there has been no release or threatened release of hazardous substances from the CSP-owned parcels to the Slough." CSP Letter at 2. CSP dismisses as "speculative" EPA's "assertion [in the CSP GNL] that surface water flow during rain events may have transported contaminants from property owned by the CSP to the Slough," and then states that "no viable mechanism for transport of contaminated sediment to the Slough from the CPSRA has been identified." *Id.* In making this argument, CSP not only ignores common sense, as its property forms the banks of the Slough, it ignores its own technical analyses. In the 1993 Preliminary Endangerment Assessment Report for the CPSRA, CSP concluded that surface water from the CPSRA drains to Yosemite Slough, stating, "[s]urface drainage in paved areas [of the CPSRA] is to City-owned storm drains and catch basins; on unpaved areas of the [CPSRA], drainage is to [the Slough]." California Environmental Protection Agency, Department of Toxic Substances Control Program ("DTSC") Preliminary Endangerment Assessment Report ("PEA"), California Department of Parks and Recreation, Candlestick Point State Recreation Area, San Francisco, California (February 8, 1993) (the "PEA") at 30 (excerpt attached as Exhibit A). The

PEA also concludes that "[t]he history of industrial land use *within* and surrounding the proposed nature area may have resulted in release of chemicals to soil and groundwater." *Id.* at 1 (emphasis added).

Lest there be any doubt, applicable case law holds that the passive migration of hazardous substances via surface water runoff or groundwater migration constitutes a release under CERCLA. *See, e.g., Castaic Lake Water Agency, et al. v. Whittaker Corp.*, 272 F. Supp. 2d 1053, 1076-77 (E.D. Cal. 2003) (discussing the CERCLA case law and concluding that "because the term "leaching" is "commonly used to describe passive migration," the inclusion of "leaching" within CERCLA's definition of "release" indicates that passive migration constitutes a "release" (citations omitted)). While passive migration may not constitute a "disposal" under CERCLA (see Section B below), it is settled law that it constitutes a release. CSP's specious argument should be dismissed.

2. CSP Perplexingly Asserts that Third Parties Did Not Identify It as a Source of Hazardous Substances as Proof that It is not a PRP.

CSP contends that "[t]hird parties conducted extensive research in 1987 and 1999 in order to ascertain possible sources of contamination in the Yosemite Creek area," and "never identified [CSP] as a source of contamination." CSP Letter at 7. CSP includes attachments in support of this assertion. *See* Attachments 8-12 to the CSP Letter. Notably, however, CSP fails to point out that those attached materials were submitted to EPA by this firm on behalf of the Yosemite Slough PRP Group (the "Group") in an effort to help EPA to identify *other* possible sources of hazardous substances in the Yosemite Slough drainage basin. CSP was not named in those materials because it had already been named as a PRP in August 2008. And of course, it is irrelevant to the issue at hand whether third parties did or did not identify CSP as a PRP. What matters is that EPA did so — and EPA did so for good reason.

3. CSP Admits that the CPSRA is Contaminated, but Curiously Asserts It is Only a Little Bit Contaminated.

CSP admits that during soil sampling that it performed on the CPSRA, "[l]ead was detected in localized areas at elevated concentrations" and that "less than of a quarter" of the 250 soil samples collected by CSP contained traces of PCBs. CSP Letter at 4. CSP does not provide support for this information, but it matters not. From a legal standpoint, there need be only one such "hit" in the sampling data to trigger a party's liability. Moreover, applying simple arithmetic, CSP concedes that its own soil sampling revealed more than 60 soil samples containing PCBs.

More important than the admissions in CSP's unsupported letter are the actual facts. As summarized in a memorandum dated July 30, 2008 that this firm provided to EPA on behalf of the Group entitled "Certain Possible Sources of Contamination at the Yosemite Creek Site" ("Group Memo") (attached as Exhibit B), ***every*** *potential COC currently being evaluated at the*

Site has been detected in soil or groundwater samples at the CPSRA in excess of the proposed Remedial Goals for Yosemite Slough, including PCBs, nickel, copper, lead, mercury and zinc. See, e.g., Group Memo at 3-4 (tables); *see also* Phase II Environmental Site Assessment, Yosemite Slough Wetlands Restoration (February 11, 2005) ("CSP Phase II") at Table 4(a) (excerpt attached as Exhibit C).

4. CSP Provides No Evidence to Support its Assertion that the Profile of CPSRA Contaminants does Not Match that of those in the Slough.

CSP contends that "evidence supports that the CSP property is an unlikely source of contaminants to the Slough because the contaminants profile in the Slough does not match contaminants found on CSP property." CSP Letter at 4. However, CSP provides absolutely no evidence — neither data nor expert opinion — to support this conclusion. That complete paucity of evidence stands in stark contrast with the simple fact that ***every** potential COC currently being evaluated at the Site has been detected in soil or groundwater samples at the CPSRA in excess of the proposed Remedial Goals for Yosemite Slough.* Completely unsupported speculation as to what is "unlikely" does not come close to meeting CSP's burden when requesting de-listing.

In sum, the presence of the same contaminants in the CPSRA that are in the Slough coupled with the surface water runoff mechanism to transport the contamination identified by both EPA and CSP's consultants, provide ample evidence that hazardous substances likely have been released from the CPSRA to the Yosemite Slough site. As the CPSRA is clearly a major source of the contamination at the Site, its owner, CSP, should remain a PRP.

B. <u>There Need Not Be a "Disposal" on CSP's Property for It to be Liable</u>.

CSP contends that it is not liable under CERCLA because the contamination at its property was not "disposed" there, but rather passively migrated there from the Bay Area Drum site. CSP Letter at 2 and 5. As discussed more fully below, the facts flatly contradict CSP's assertion. Its novel theory also is contravened by the plain language of CERCLA. While it is true that passive migration does not constitute "disposal" under CERCLA, *see Carson Harbor Village, Ltd. v. Unocal Corp.,* 270 F.3d 863, 878-79 (9th Cir. 2001) (discussed in *Castaic Lake, supra*), it is irrelevant whether the hazardous substances on the CPSRA were "disposed" on the property or "released" to the property. Section 9607(a)(1) defines the category for current owners and operators as "the owner and operator of a . . . facility"; it does *not* require a disposal.[1] And, as CSP itself notes, the definition of "facility" includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located.*" CSP Letter at 2 (*quoting* 42 U.S.C. §9601(9)(B)) (emphasis added). In sum, the CPSRA plainly

[1] CSP quotes from *Courtaulds Aerospace, Inc. v. Huffman,* 826 F. Supp. 345, 349 (E.D. Cal. 1993), which inexplicably defined the current owner class of liable parties as "current owners or operators of a facility where hazardous substances were disposed." CSP Letter at 1. Moreover, the *Courtaulds* statement is mere (incorrect) dicta, as the case concerned only arranger liability under Section 9607(a)(3).

is a facility from which there was a release of hazardous substances, and as the CPSRA's owner, EPA appropriately identified CSP as a PRP.

C. CSP Fails to Establish Several Key Elements of its CERCLA Defenses.

CSP contends that it is an innocent landowner under CERCLA and that CSP is exempt from CERCLA liability as a contiguous landowner. The Innocent Landowner Defense and the Contiguous Landowner Exception are construed narrowly to further CERCLA's remedial purpose, and a party must establish all of the elements of these defenses by a preponderance of the evidence. *See Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1539-40 (E.D. Cal. 1992); *see also* 42 U.S.C. § 9607(b)(3) (*quoted in* the CSP Letter at 2), and 42 U.S.C. § 9607(q)(1)(B). As discussed below, CSP's arguments regarding these defenses amount to pure speculation and its technical conclusions lack any evidentiary basis. Thus, CSP fails to meet its burden to establish any defense to its CERCLA liability.

We do not here address each of CSP's failures. It is sufficient to note that while CSP must establish ***all*** of the elements of these defenses by a preponderance of the evidence, CSP fails to provide *any* evidence or technical support for its theories for how it satisfies the individual elements of the defenses. As such, we focus only on the two core deficiencies of CSP's argument, which apply to both defenses: its failure to establish that a third party was responsible for the contamination on its property, and its failure to establish that it has exercised due care on its property.[2] Facts already in the record amply refute CSP's unsupported claims with respect to both of these central issues.

1. The Record Demonstrates that There Has Been No Passive Migration of Contaminants from the Bay Area Drum Site to the CPSRA.

CSP claims it satisfies the first element of these defenses that a "third party was the sole cause of the release of hazardous substance" by asserting that "[i]f the CSP property did result in contamination of the Yosemite Slough, then it was only through passive migration of contamination from the Bay Area Drum Site which would not invoke liability under CERCLA." CSP Letter at 5. CSP fails to cite any support for this assertion.[3]

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[2] The language of the Contiguous Landowner Exemption's requirement is a little different from the Innocent Landowner Defense's due care requirement, but it is tantamount to the same thing. It requires the landowner to "take[] reasonable steps to (I) stop any continuing release; (II) prevent any threatened future release; and (III) prevent or limit human environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person." 42 U.S.C. § 9607(q)(1)(A)(iii).

[3] It also bears mention that during the more than 20 years since sampling began at the CPSRA in 1988 (CSP Letter at 8) — and despite the fact that the Bay Area Drum site was being investigated and remediated during much of this time — this is, to our knowledge, the first time that CSP has alleged that the contamination on its property originated from the Bay Area Drum site.

CSP has not provided even a shred of evidence linking hazardous substances at the Bay Area Drum site to the contamination detected on its property. It has not because it cannot. The Bay Area Drum site was fully investigated, including sampling both onsite and offsite. *See* Remedial Investigation Report, Former Bay Area Drum Site (December 1999) ("Bay Area Drum RI Report") (excerpts attached as Exhibit D). The Bay Area Drum RI Report concluded that "[a]nalyses of data gap soil samples from Thomas Avenue and Hawes Street indicate that chemicals that may be associated with the [Bay Area Drum] Facility do not appear to extend to soil beyond the curb." *Id.* at xi – xii. The remedial action plan for the Bay Area Drum site that was approved by DTSC did not require any remediation on Thomas or Hawes, much less on the CPSRA. The subsequent five-year review conducted following the cleanup similarly found no indication that contamination had migrated offsite. The available evidence indicates that there has been *no* migration of contaminants from the Bay Area Drum site to the CPSRA.

Instead, CSP relies on pure speculation: "Mechanisms for *possible* migration . . . include surface water runoff directly from the Bay Area Drum Site onto the CSP property during storm events, wind-blown contamination onto CSP property, or leakage from the combined sewer line." CSP Letter at 4 (emphasis added). CSP's claim to have established by a preponderance of the evidence that the Bay Area Drum site was the sole cause of the contaminants on its property on the basis of such unsupported speculation is curious — and ironic, given that elsewhere it dismisses as pure speculation the actually documented surface water runoff from its property to the Slough. Not only is CSP's position paradoxical, it defies logic and common sense, since the CPSRA includes property on the ***south*** shore of the Slough as well. Sampling performed by CSP has generated numerous soil samples containing PCBs, lead, mercury and zinc on the southern portion of the CPSRA property. *See, e.g.*, Group Memo, Exhibits B and C. It's not tenable to argue that the sole cause of this contamination is surface water runoff from Bay Area Drum migrating across the northern parcel of the CSPRA and across the Slough itself.

Rather, the most likely source of the contamination on the CPSRA is the CPSRA itself. CSP's own letter documents the years of industrial activity that took place there. First, CSP acknowledges that an underground storage tank was present on the property and removed. CSP Letter at 7. Second, contrary to its statement that "the only developed CSP property is within "Area C" in the 1986 photo," *id.* and Attachment 6, the 1965 and 1973 aerial photos that CSP included as Attachments 4 and 5 also plainly show the same industrial activity within the area marked "Area C" in the 1986 photo. Lastly, though CSP apparently is unaware of it, there is ample evidence of industrial activity throughout the northern parcel of the CPSRA. *See* Group Memo at 6 and Exhibit G (discussing former industrial uses of the property, including an auto wrecking & salvage yard, and a manufacturing equipment machine shop).

2. CSP has Not Exercise Due Care on its Property.

CSP cannot establish that it exercised due care with respect to the hazardous substances on the CPSRA. A party "can prove they exercised due care if they 'took all precautions with

respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.'" *See Castaic Lake, supra,* 272 F. Supp. 2d at 1082 (*quoting State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 360, 361 (2nd Cir. 1996). "Such precautions would include 'those steps necessary to protect the public from a health or environmental threat.'" *Id.* (*quoting Lashins Arcade*, 91 F.3d at 361).

CSP asserts that it exercised due care and took precautions against foreseeable acts or omissions of third parties by "conducting extensive chemical testing of the CPSRA parcels to evaluate the quality of the soils," and states that "[m]ore than 250 soil samples were collected and analyzed for environmental contaminants, including the COPCs associated with Slough sediments." CSP Letter at 8. (As noted above, *every* COC currently being evaluated at the Yosemite Slough Site was found at levels in excess of the current Remedial Goals during CSP's sampling. *See, e.g.,* Group Memo, Tables at 3-4; CSP Phase II, Table 4(a).) While collecting data is a good first step, it hardly constitutes due care. CSP provides *no* evidence that it has taken precautions against the release into the Slough of the hazardous substances that it detected on its property, despite the fact that its own reports indicated that surface water runoff from its property discharges into the Slough.

With respect to acting on the data indicating that its property is contaminated, CSP's record is decidedly mixed. In its letter, CSP mentions only recent activities whereby "lead-impacted soils in the northern parcels was removed during recent restoration construction for the Yosemite Slough Restoration Project" and states that "[d]uring the earthwork recently completed for the wetland restoration on the north side, over 150,000 cubic yards of fill materials were excavated and regraded (*sic*)." CSP Letter at 8. However, CSP does not state what investigations and sampling were done in relation to this work. More to the point, CSP provides *no* evidence that it took any steps necessary to protect the public from a health or environmental threat during the more than 20 years between the discovery of hazardous materials at the CPSRA in 1988 and these more recent park development activities.

CSP also does not mention another aspect of its recent work at the CPSRA: Without notice to EPA or any other party involved with the Yosemite Slough site, last November CSP unilaterally removed the portion of land that had acted as a *de facto* dike between the Slough and the areas that it had excavated on the northern side of the CPSRA, and thereby caused tidal waters from the Slough to flow into the excavated areas. *See* N. van Aelstyn letter to K. Tobias dated December 7, 2011 (attached as Exhibit E). In addition, CSP breached the dike without first collecting confirmation samples to ensure that the newly excavated areas did not contain the sort of contamination detected in the CPSRA's soil and groundwater. Since then CSP has steadfastly refused requests from several members of the Yosemite Slough Technical Stakeholder Committee to perform confirmation sampling. Breaching the dike may well have spread the contamination on CSP's property to the Slough, and may enable contamination in the Slough sediments to migrate to the newly created tidal wetlands. Such unilateral action is the very opposite of the due care to prevent the spread of contamination that CERCLA requires.

D. Conclusion.

Based on its own admissions and reports prepared by its own consultants, CSP is a PRP at the Yosemite Slough site as the current owner of property from which there was a release of hazardous substances. In addition, CSP's speculative and unsupported theories fail to establish the core elements of the Innocent Landowner Defense or the Contiguous Landowner Exemption. EPA's designation of CSP as a PRP at the Yosemite Slough Site remains valid, and EPA should reject CSP's request to be de-listed. Instead of using its purported limited resources[4] on misplaced and unsupported efforts to escape all liability, CSP should take responsibility for its role in the contamination of the sediments in Yosemite Slough.

Sincerely,

Nicholas W. van Aelstyn

cc: Kathryn J. Tobias, Esq. (w/ exhibits) (*via email*)
Elaine O'Neil, Esq. (w/ exhibits) (*via email*)

[4] CSP has repeatedly reminded EPA and others at the Site that its resources are terribly constrained. However, that claim has been called into doubt by recent reports of $54 million in hidden funds (*see, e.g.*, http://www.sfgate.com/politics/article/State-parks-director-resigns-amid-surplus-scandal-3723294.php), as well as by the fact that it and its partner the California Parks Foundation have conducted a great deal of costly work at the CPSRA.